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No. 82-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASHOK K. GUMBHIR,
Petitioner

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent

On Writ of Certiorari to the
Supreme Court of the State of Kansas

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION.

The Brief in Opposition filed herein by the defendant-respondent clearly demonstrates the point of departure upon which this case must be decided and constitutes eloquent testimony in favor of a grant of certiorari. Petitioner is compelled to Reply to the Respondent's Brief in Opposition and to respond to the new arguments contained in respondent's brief.

II. THE LOWER COURT APPLIED, AND RESPONDENT URGES, AN INAPPROPRIATE STANDARD.

A. The Kansas Supreme Court did not apply the appropriate standard in deciding, as a matter of law, to deny petitioner's request for attorneys' fees under 42 U.S.C. §1988, after finding that he was the prevailing party in an action brought under 42 U.S.C. §1983. The Kansas Supreme Court applied, and the respondent appears to be arguing, a standard which would require a finding that federal constitutional claims to be meritorious, upon detailed inquiry, before there can be an award under the Civil Rights Attorney's Fees Act. However, the statute authorizes an award of fees to "the prevailing party," in "any action or proceeding to enforce", *inter alia*, 42 U.S.C. §1983.

By the terms of the statute, then, one need only be the prevailing party in a suit containing a claim under the Civil Rights Acts; it does not require that the party have prevailed on that particular claim. The legislative history and the majority of the case authorities construing the statute have so stated: the inquiry is only to determine whether the federal claim, not wholly insubstantial, has been joined with the state law claim arising from the same common nucleus of operative fact.

Respondent has failed to cite a single authority which supports a detailed inquiry into the merits of a plaintiff's federal claims before attorneys' fees are awarded.

The decision of the Kansas Supreme Court not only applied an inappropriate standard, it conflicted with many other lower court decisions. Certiorari is required to resolve this conflict and to state the correct standard to be applied.

B. Respondent's brief then appears to acknowledge that the "substantial/common nucleus of operative fact" standard is applicable. But respondent improperly interprets this to mean that attorneys' fees will be justified only after an in-depth evaluation establishes the federal claims to have been meritorious. However, "substantial" has never been interpreted in that manner by other Courts, including this Court. Such an interpretation directly conflicts with this Court's ruling in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), which has heretofore been universally held applicable to attorneys' fees claims under 42 U.S.C. §1988.

C. Finally, respondent attempts to uphold the decision of the Kansas Supreme Court by arguing that petitioner's contentions below under the federal Civil Rights Acts were not "substantial" and did not arise from a nucleus of operative fact in common with the state law claims. In making that argument the respondent has not only incorrectly defined "substantial", it has also incorrectly defined "common nucleus of operative fact."

In the present case, petitioner's federal constitutional claims were not obviously frivolous or clearly insubstantial; therefore, by definition and for purposes of an attorneys' fees award, the claims were "substantial." Further, petitioner's federal law claims arose from the identical facts as the state law claims, so the federal claims arose from a common nucleus of operative fact.

Petitioner requests the Court to make a final statement of the applicable standard and to define the terms used therein as most lower courts have done.

III. PETITIONER PROPOSES THE APPROPRIATE STANDARD FROM THE MAJORITY OF LOWER COURT DECISIONS AND THE LEGISLATIVE HISTORY.

A. Respondent relies on a noncontextual quotation from this Court's opinion in *White v. New Hampshire Department of Employment Security,* 455 U.S. --, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), to support his contention that

there must be a determination "if the plaintiff's civil rights have been violated". Brief in Opposition, page 2.

The *White* case involved only the issue of whether a post-judgment motion for attorneys' fees was timely. The timeliness of Dr. Gumbhir's request for attorneys' fees is not an issue in the present case. This Court did not speak, in *White,* to the issue of the definition or scope of inquiry into the plaintiff's federal civil rights claims for purposes of determining attorney's fees.

B. In issue in the present case is the appropriate definition of a "substantial federal claim arising from a common nucleus of operative fact".

It would appear from the Brief in Opposition that respondent denies the applicability of the test which upholds federal claims as substantial if they are not "wholly insubstantial", "obviously frivolous", "plainly insubstantial", or "obviously without merit". Brief in Opposition, page 6.

Yet that is the exact definition stated by the Courts in defining "substantial" for purposes of pendent jurisdiction or for purposes of awarding attorneys' fees under 42 U.S.C. §1988. See Petition for Writ of Certiorari, pages 7 and 11.

Respondent argues the existence of a two-pronged test for determining whether to award to a plantiff attorneys' fees when he has prevailed on state law grounds. Brief in Opposition, page 6. Respondent then proceeds to confuse the two "prongs" of the test.

If there are two prongs established by legislative and judicial history, they are (1) that the federal claims arise from a common nucleus of operative fact, and (2) that the federal claims be substantial. H.R. 94-1558, 94th Cong., 2d Sess., p.4, n.7 (1976).

1. The "common nucleus of operative fact" standard merely requires that the facts relative to the federal law and state law claims be basically similar, so that a plaintiff would be expected to try them both in a single action. *Hatridge v. Aetna Casualty & Surety Company,* 415 F.2d 809, 816-817 (8th Cir. 1969); *Hargrave v. Oki Nursery, Inc.,* 646 F.2d 716 (2d Cir. 1980).

The foundation of this rule is the Court's interest in having a litigant's whole case tried at one time. See, e.g. *Baltimore Steamship Company v. Phillips,* 274 U.S. 316, 320, 47 S.Ct. 600, 71 L.Ed. 1069 (1924) and *United States v. California & Oregon Land Company,* 192 U.S. 355, 358, 24 S.Ct. 266, 48 L.Ed. 476 (1904).

In *Associated General Contractors of California v. San Francisco Unified School District,* 616 F.2d 1381 (9th Cir. 1980), cert. den., sub. nom. *National Association of Minority Contractors v. Associated General Contractors of California,* 449 U.S. 1061, 66 L.Ed.2d 603, 101 S.Ct. 783 (1980), the Court of Appeals properly held that pendent jurisdiction existed over a state law claim challenging the adoption of regulations by a state administrative agency when that claim was joined with a civil rights claim brought under 42 U.S.C. §§1981 and 1983. 616 F.2d at 1384.

Similarly in the present case, petitioner's state law claim challenging the state statute was joined with a claim under 42 U.S.C. §1983. Those claims arose from a "common nucleus of operative fact."

In *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), upon which respondent places reliance, there were federal and state law claims arising from identical facts. There was a single wrong done to the plaintiff. In the present case there were federal and state law claims arising from identical facts and there was a single wrong: the denial of registration to Petitioner as a pharmacist. Identical facts are, *a fortiori,* "inextricably woven."

Of importance to note is the absence of reference in the Brief in Opposition of a single particular in which the operative facts of Dr. Gumbhir's federal and state claims differ.

Clearly, where the federal claims arise from the same facts as the state law claims, there is a "common nucleus of operative fact." *Sanchez v. Lowell Leberman, Inc.,* 79 F.R.D. 21, 23 (W.D. Tex. 1978); *Kaminski v. Shawmut Credit Union,* 416 F. Supp. 1119, 1123 (D. Mass. 1976); *Garza v. Chicago Health Clubs, Inc.,* 347 F.Supp. 955, 960 (N.D. Ill, 1972).

Thus petitioner requests the Court to hold that the first prong of the test requires the federal law and state law claims to arise from a common nucleus of operative fact and that this test is met when the claims are based upon the same facts.

2. The other prong of the *Hagans/Gibbs* test found in the legislative and judicial history of the Civil Rights Attorneys' Fees Act is that the federal claims must have been "substantial". Petitioner requests this Court to adopt this test and to give to the term "substantial" the definition applied by the Court in pendent jurisdiction cases.

In pendent jurisdiction cases, the Courts have defined a "substantial" federal claim to be one which is "not wholly insubstantial."

> Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 48 L.Ed. 795, 24 S.Ct. 553 (1904); "wholly insubstantial," *Bailey v. Patterson,* 369 U.S. 31, 33, 7 L.Ed.2d 512, 82 S.Ct. 549 (1962); "Obviously frivolous," *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 54 L.Ed. 482, 30 S.Ct. 326 (1910)"plainly unsubstantial," *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103, 105, 77 L.Ed. 1062, 53 S.Ct. 549 (1933); or "no longer open to discussion," *McGilvra v. Ross,* 215 U.S. 70, 80, 54 L.Ed. 95, 30 S.Ct. 27 (1909).
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> *Hagans v. Lavine, supra,* 415 U.S. at 537.

The only inquiry required is to determine whether the claims were "*wholly* insubstantial" or "*obviously* frivolous." These emphasized words are of legal importance because claims are insubstantial only if their unsoundness is so clear that there is no room for the inference that the claims can be the subject of controversy. *Goosby v. Osser,* 409 U.S. 512, 518, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973); *Ex Parte Poresky,* 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933).

Conversely, the definition of the term "substantial" by the Kansas Supreme Court in this case establishes ample

justification for certiorari, because the Kansas court defined "substantial" to mean "meritorious". Certiorari is needed to state specifically the standard by which the federal claims of a prevailing plaintiff are to be measured in deciding whether to award attorneys' fees and to define the terms used in that standard for the guidance of the lower courts in applying the Civil Rights Attorneys' Fees Act.

IV. CONCLUSION.

Contrary to respondent's argument, Brief in Opposition, page 5, this petitioner does not now argue, and he has never argued, that the "mere allegation" of a federal civil rights claim in conjunction with a state law claim would give rise to an award of attorneys' fees under 42 U.S.C. §1983. Petitioner does contend that this Court should take this opportunity to confirm and make universal the majority rule in this country; in order to determine whether to award attorneys' fees under the Civil Rights Attorneys' Fees Act in a case where plaintiff has prevailed on state law grounds (which had been joined with federal law grounds upon which there was no ruling), the Court should decide (1) whether the federal law claims were wholly insubstantial or obviously without merit, and (2) whether the federal law claims arose from the same basic factual setting.

Petitioner requests the Court to grant certiorari.

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